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## False Claims in Fight Over California's False Claims Act

by Dennis J. Ventry Jr.



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In this article, the author reviews the business lobbying efforts that derailed California legislation to amend the state's False Claims Act by permitting tax claims. He argues that opposition to the bill was based on false or misleading claims, and that those efforts effectively helped conceal tax fraud. Ventry also connects the campaign against private enforcement of tax laws with recent "anti-deference" efforts that undercut public enforcement of those same laws.

Supporters of California A.B. 1270 proposed amending the state's False Claims Act (FCA) by permitting private citizens to inform California tax authorities of undetected tax fraud.<sup>1</sup> "Tax agencies need all the help they can get from the public," former Multistate Tax Commission Executive Director Dan Bucks has argued, particularly when it comes to fraud that goes undetected through traditional tax enforcement

methods.<sup>2</sup> Citizen-whistleblowers could help California's tax authorities catch tax cheats by providing unique inside information pertaining to undetected tax fraud and noncompliance reflecting billions in forgone revenue.<sup>3</sup> California Attorney General Xavier Becerra (D) sponsored the bill, heralding it as a way to combat tax fraud and protect taxpayers and the state treasury.<sup>4</sup>

Specifically, A.B. 1270 applied the California false claims statute for the first time to some claims involving tax fraud. Whistleblowers would have been authorized to bring actions under the FCA if damages pleaded exceeded \$200,000 and the income or sales of the taxpayer alleged to have defrauded the state or locality exceeded \$500,000.<sup>5</sup> Moreover, the bill required the attorney general to consult with and ultimately receive the consent of the relevant tax authorities before conducting any action.<sup>6</sup> Further, if the attorney general declined to proceed with the action, the whistleblower who initiated the claim could go forward as a *qui tam* plaintiff only after receiving the attorney general's written consent.<sup>7</sup>

Rather than embrace citizen-whistleblowers as a complement to traditional tax administration

<sup>1</sup>The amendments to California's FCA reflected in A.B. 1270 used "taxing authorities" to describe all entities to which a taxpayer might make a false claim under the amended statute, including "agencies, department, boards, commissions, or other entities responsible for the imposition, settlement or administration of any tax, fee, or surcharge program under the Revenue and Taxation Code." See Cal. Gov't Code section 12651(f)(8). This article uses tax authorities, taxing authorities, and tax agencies interchangeably.

<sup>2</sup>Dan Bucks, "Making Corporate Taxes Work, Part 5: Empowering Citizens for Tax Equality," *State Tax Notes*, July 29, 2013, p. 283 (further stating that "combining the information and initiative of the citizen with the established knowledge and expertise of the tax agency is appropriate in the realm of taxation"). *Id.* at 288.

<sup>3</sup>The California Franchise Tax Board estimates that the tax gap (the difference between tax owed and tax paid) in California was as high as \$25 billion in tax year 2018. A not insignificant (though fully unknowable) percentage of that figure reflects false claims submitted by taxpayers to California taxing authorities, claims that A.B. 1270 was designed to expose, prosecute, and collect upon. It is important to note that the estimated tax gap is likely much smaller than the actual tax gap, particularly when it comes to measuring undetected tax fraud.

<sup>4</sup>California Attorney General Xavier Becerra release announcing A.B. 1270 (Apr. 10, 2019).

<sup>5</sup>See Cal. Gov't Code section 12651(f)(8).

<sup>6</sup>*Id.* at section 12651(f)(3).

<sup>7</sup>*Id.*

and enforcement, California business interests strongly opposed A.B. 1270. Their opposition ultimately derailed the legislation — effectively protecting tax cheats, tacitly condoning undetected fraud, and preserving a growing hole in the state's coffers.

In their campaign against A.B. 1270, business interests peddled four baseless criticisms, which are exposed here. To that end, the article describes how business opposition to A.B. 1270 effectively concealed tax fraud. At the same time, it reveals the business interests' broader efforts to eviscerate not just private — but also public — enforcement of tax laws.

### False Claim 1: A.B. 1270 Would Apply to Good-Faith Disputes Over California Tax Laws

According to opponents, tax claims brought under an amended California FCA would target “good faith errors” and harm taxpayers who make “good faith arguments”<sup>8</sup> in attempting to resolve “legitimate tax disputes” and “credible claims.”<sup>9</sup>

Those assertions are false. In no way whatsoever would A.B. 1270 have applied to good-faith, legitimate, or credible tax positions.

Like the federal FCA and all 30 state-level FCAs, California's FCA has nothing to do with good-faith disputes over the law. Rather, FCAs target persons who “knowingly” submit false or fraudulent claims against the government, either to obtain money or property from the government or to avoid paying or transmitting money or property to the government.<sup>10</sup>

Moreover, FCAs define the terms “knowing” and “knowingly” as:

- possessing actual knowledge of the false facts and information submitted to the government;

- acting in deliberate ignorance of the truth or falsity of the information; or
- acting in reckless disregard of the same.<sup>11</sup>

None of those definitions reflects good-faith behavior.

If that weren't enough, A.B. 1270's amendments to the state FCA did not apply to taxpayers who either had a reasonable basis for their position or relied upon a good-faith interpretation of the law (both of which reflect low standards of care<sup>12</sup>) so long as the taxpayer had not knowingly submitted false facts to the government.<sup>13</sup> Further, the legislation created a safe harbor for taxpayers who disclosed to relevant tax authorities their positions and all material facts related to the positions; stated differently, the amendments only applied to taxpayers who concealed relevant facts or falsified disclosed facts.<sup>14</sup>

Finally, the attorney general's office worked hard to dispel any notion that A.B. 1270 would apply to good-faith disputes over the state's tax laws. “This bill does not punish innocent mistakes,”<sup>15</sup> Supervising Deputy Attorney General Rick Acker told the Senate Judiciary Committee. “It does not punish people who vigorously contest their tax bills but are honest with the government. It only punishes people who commit tax fraud.”<sup>16</sup>

The attorney general's efforts were in vain, however, as business interests refused to engage

<sup>11</sup> See *id.* at section 12650(b)(3).

<sup>12</sup> The prevailing standards peg “reasonable basis” certainty at between 10 and 25 percent likelihood of success on the merits, a level of support that although arguable is “fairly unlikely to prevail in court upon a complete review of the relevant facts and authority.” H.R. Rep. No. 97-760, at 575 (1982) (Conf. Rep.). See also Dennis J. Ventry Jr. and Bradley T. Borden, “Probability, Professionalism, and Protecting Taxpayers,” 68 *Tax Law.* 83, 88-90, 113-16 (2014); Sheldon I. Banoff, “Dealing With the ‘Authorities’: Determining Valid Legal Authority in Advising Clients, Rendering Opinions, Preparing Tax Returns, and Avoiding Penalties,” 66 *Taxes* 1072, 1128 (1988).

<sup>13</sup> See Cal. Gov't Code at section 12651(f)(7). See also section 4(c) (as proposed) (“The Legislature finds and declares that a person who has not knowingly made, used or caused to be made or used a false claim, record or statement, and has not prepared or submitted claims, records, or statements that assert an unreasonable position made in bad faith, shall not be subject to liability under subdivision (f) of Section 12651 of the Government Code [that is, the section that would have added tax claims to the FCA].”).

<sup>14</sup> *Id.*

<sup>15</sup> Laura Mahoney, “California Bill Would Allow Tax Fraud Whistleblowers,” *Bloomberg Tax*, July 3, 2019.

<sup>16</sup> *Id.*

<sup>8</sup> California Chamber of Commerce to Members of Senate Judiciary Committee, Re. A.B. 1270 (Stone) False Claims Act (June 26, 2016).

<sup>9</sup> California Society of CPAs to Assembly member Mark Stone, “AB 1270 (Stone) Expansion of the False Claims Act to Include Tax Matters” (June 25, 2019). See also Eric Coffill, “Amending Calif. FCA Is Not the Best Way to Fight Tax Gap,” *Law360* (Aug. 9, 2019) (stating that A.B. 1270 applies to “legitimate tax positions”); Civil Justice Association of California et al. (CJAC) to Sen. Hannah-Beth Jackson, “Re. AB 1270 (Stone)” (June 26, 2019) (asserting that A.B. 1270 would apply to a “legitimate . . . unsuccessful disagreement over the application of the tax law” and tax positions with “credible authority”).

<sup>10</sup> See Cal. Gov't Code section 12650(b)(7).

on the facts — instead repeating the false mantra that A.B. 1270 would apply to good-faith disputes over the law.

### **False Claim 2: Tax Law Is Complex and Uncertain — Its Administration and Enforcement Should Be Left to Tax Authorities**

Critics of A.B. 1270 also observed that California's tax laws "are many and complex and are already administered . . . by multiple specialized agencies."<sup>17</sup> These agencies — namely the Franchise Tax Board and the California Department of Tax and Fee Administration (CDTFA) — are "well-funded"<sup>18</sup> and can deploy a battalion of tax attorneys and revenue agents "fully capable of dealing with tax fraud."<sup>19</sup>

"Tax issues are complicated," went the refrain, and state tax authorities "employ experts capable of dealing with complex tax issues, many of which are nuanced and often subject to degrees of interpretation."<sup>20</sup> Even independent and experienced commentators on California politics fell under the spell of the business community's beguiling refrain. Dan Walters, for one, wrote in his influential CalMatters column that amending California's FCA to include tax claims was unnecessary given the state's "fearsome reputation for going after those they deem to be avoiding payment."<sup>21</sup>

Critics further charged that allowing any person or other government entity besides California's tax authorities to enforce the state's tax laws would make it "difficult, if not impossible," for those agencies to "effectively administer tax issues, including development of cases for litigation and settlement of tax disputes."<sup>22</sup> The only solution, critics concluded, is for tax authorities to "be the sole entities that administer and enforce state and local tax laws." To do otherwise would "usurp[] the authority of those agencies" and prevent them from "consistently and equitably" administering and enforcing the tax laws.<sup>23</sup>

For a dose of reality, tax is neither special nor so unique as to militate against allowing anyone but tax authorities to uncover and prosecute noncompliance. Yes, complying with tax statutes often requires the assistance of paid professionals, and the law is constantly changing. But the same can be said of other areas of the law, including securities, environmental, and health law — all of which rely on regimes that encourage and reward the participation of whistleblowers in enforcement efforts.<sup>24</sup>

Even if it were true that enforcing tax laws should be the sole province of tax authorities — a position that tacitly endorses fraud that goes undetected by those authorities — A.B. 1270's proposed amendments to California's FCA expressly vested tax enforcement power in the state's tax authorities.

<sup>17</sup> Coffill, *supra* note 9 (stating that the FTB and CDTFA have 100 and 80 lawyers on staff, respectively).

<sup>18</sup> Kyla Christoffersen Powell, "Legislation Will Promote Frivolous Shakedown Suits," *Daily Journal*, Aug. 29, 2019 (also observing that the FTB and CDTFA already "handle tax laws and fraud that fall under their purview").

<sup>19</sup> Coffill, *supra* note 9.

<sup>20</sup> Council On State Taxation to California Senate Standing Committee on Judiciary, "Re: COST's Opposition re. AB 1270; Removing the Prohibition Against Tax False Claims Act Suits" (June 25, 2019). *See also* Powell, *supra* note 18 (writing that "tax issues are complicated and are best left to taxing authorities to pursue enforcement and prosecution of the law").

<sup>21</sup> Dan Walters, "Striking With a Hot Iron," CalMatters, (Aug. 26, 2019).

<sup>22</sup> *Id.* *See also* Powell, *supra* note 18 (claiming that A.B. 1270 would "undermine the good work of our robust state agencies"); Stephen P. Kranz, et al., "Vultures Circling as Bill to Expand California FCA to Tax Looms in Legislature," Inside SALT Blog (Aug. 26, 2019) (claiming that A.B. 1270 "threatens to open the litigation floodgates and undermine the authority of California tax administrators — instead, putting tax administration in the hands of for-profit bounty hunters").

<sup>23</sup> COST, *supra* note 20.

<sup>24</sup> For the SEC's whistleblower program, see the SEC website. For the Environmental Protection Agency's whistleblower program, see the Office of the Inspector General website. For whistleblower programs pertaining to health law, consider that most states with FCAs cover Medicaid fraud under their statutes.



Specifically, A.B. 1270 obligated the California attorney general or relevant prosecuting authority<sup>25</sup> to consult with the state tax authority to whom the alleged false claim was submitted *before* filing or intervening in any action under the FCA.<sup>26</sup> Further, if the tax authority objected to the attorney general proceeding with the claim, A.B. 1270 prohibited the attorney general from going forward.<sup>27</sup> And if the attorney general declined to intervene in the action, the whistleblower who alerted the government to the alleged false claim could only proceed with the action on her own if the attorney general consented in writing.<sup>28</sup>

In other words, under A.B. 1270 the attorney general could not proceed with a false claim involving taxes without both consulting with and receiving the express consent of the relevant tax authority. Moreover, a whistleblower could only proceed with the action on her own if the attorney general — after declining to intervene in the action either because the tax authority failed to give consent or the attorney general decided against pursuing the action on its merits — granted the whistleblower written consent to proceed on her own, a highly unlikely scenario.

So much for the false claim by critics that A.B. 1270 would “usurp” the power of California’s tax authorities or step on authorities’ toes.

<sup>25</sup> California’s FCA permits a prosecuting authority to bring claims alleging violation of the false claims statute. *See, e.g.*, Cal. Gov’t Code section 12652(a)-(b). Prosecuting authority is defined as “the county counsel, city attorney, or other local government official charged with investigating, filing, and conducting civil legal proceedings on behalf of, or in the name of, a particular political subdivision and includes counsel retained by a political subdivision to act on its behalf for these purposes.” *Id.* at section 12650(b)(8). Other states similarly permit sub-state governments or entities to bring actions under their FCAs. New York, for instance, authorizes local governments to investigate and prosecute civil actions that may have resulted in damages to those local governments. *See* N.Y. State Fin. Law section 190(a). The New York FCA defines local government as “any New York county, city, town, village, school district, board of cooperative educational services, local public benefit corporation or other municipal corporation or political subdivision of the state, or of such local government.” *Id.* at section 188(6).

<sup>26</sup> *See* Cal. Gov’t Code section 12651(f)(3). Such consultation was mandatory:

The Attorney General or prosecuting authority shall consult with the taxing authorities to whom the claim, record, or statement was submitted prior to filing or intervening in any action under this article that is based on the filing of false claims, records, or statements made under the Revenue and Taxation Code.

<sup>27</sup> *See id.* Such prohibition was also binding: “The Attorney General or prosecuting authority shall not file, or intervene in, any such action if such taxing authority objects in writing to such filing or intervention.”

<sup>28</sup> *See id.* (“If the Attorney General or prosecuting authority declines to intervene in such an action, the action may only proceed if the Attorney General or prosecuting authority consents in writing.”).

Finally, note that no California tax authority — including most prominently the FTB and CDTFA — objected to A.B. 1270 becoming law. Presumably, if the legislation was as disruptive and damaging to the power and efficient administration of state tax authorities as opponents insisted, the affected authorities would have raised concerns.

### False Claim 3: The Current Tax Penalty Regime Is Strong Enough to Deter Tax Fraud

This third false claim is closely related to the second. It suggests that the current tax regulatory and enforcement regime in California is already robust enough, both with compliance burdens as well as the deterrent effects and penalties on noncompliance. Thus, creating an additional enforcement tool would be duplicative and unnecessary.

The California Chamber of Commerce, for example, asserted that A.B. 1270 represented “a solution in search of a problem.”<sup>29</sup> The chamber was “unaware of any reporting of rampant tax fraud in California that would justify new tools such as the FCA being utilized.”<sup>30</sup> For its part, the California Society of CPAs said the state’s “already aggressive penalty system . . . incentivizes taxpayers to take a cautious position on their initial return.”<sup>31</sup> Meanwhile, a prominent tax attorney at a leading law firm that opposes private enforcement of state tax laws while supporting weaker public enforcement<sup>32</sup> argued that the FTB already “has at its disposal 79 different penalties, including a fraud penalty that is imposed at the rate of 75 [percent] of the disputed amount,” and that tax authorities can criminally prosecute taxpayers for some tax violations.<sup>33</sup>

One can debate the robustness and effectiveness of California’s penalty regime and its effect on taxpayer behavior. But one thing is certain: California does not have a statute that

<sup>29</sup> Robert Moutrie, “CalChamber-Opposed Bill Will Increase Frivolous Litigation Against California Businesses,” CalChamber Advocacy (Aug. 13, 2019).

<sup>30</sup> *Id.*

<sup>31</sup> California Society of CPAs, *supra* note 9.

<sup>32</sup> *See infra* notes 85-107 and accompanying text.

<sup>33</sup> Coffill, *supra* note 9.

applies to fraud hidden from state tax authorities. Thus, critics who argued against adding tax claims to California's FCA can talk until they are blue in the face about being "unaware of any reporting of rampant tax fraud in California." It is not reported fraud that false claims statutes target, but unreported fraud.

A.B. 1270 would have established a mechanism for detecting, investigating, and prosecuting undetected fraud. Opponents of A.B. 1270, on the other hand, preferred keeping such fraud unreported, undetected, and unprosecuted.

#### **False Claim 4: A.B. 1270 Would Bring 'Frivolous Shakedown Lawsuits'**

The A.B. 1270 scaremongering<sup>34</sup> reached a fever pitch when opponents insisted that adding tax claims to California's FCA would precipitate a flood of nuisance suits brought by "circling vultures," otherwise known as whistleblowers and members of the plaintiffs' bar.<sup>35</sup>

False Claim #4 borrowed from False Claim #1 (that is, A.B. 1270 applied to good-faith disputes over California tax laws) and False Claim #2 (that is, A.B. 1270 usurped the authority of state tax agencies to administer and enforce complex tax laws), both of which lacked merit. Consider the following alarmist statements from critics of the bill predicting an avalanche of nuisance suits. A.B. 1270:

- created a "shakedown lawsuit mechanism to trap unwary businesses";<sup>36</sup>
- included "bounty hunting provisions" designed for "plaintiffs' lawyers" to "extort individuals and businesses into paying meritless settlements";<sup>37</sup>
- "will open the door for a cottage industry of financially driven plaintiffs' lawyers to act as bounty hunters," and "threatens to open the litigation floodgates and undermine the authority of California tax administrators —

instead, putting tax administration in the hands of for-profit bounty hunters";<sup>38</sup>

- "converts the existing system of resolving tax disputes into one where government and private plaintiffs have the incentive to bring False Claims Act cases";<sup>39</sup>
- would "lead to numerous lawsuits that could overburden the judicial system";<sup>40</sup>
- would permit "vague accusations of noncompliance with law to lead taxpayers to be haled into court";<sup>41</sup>
- would "force" California taxpayers "to defend themselves in high-stakes civil investigations and/or litigation — even when the attorney general's office declines to intervene";<sup>42</sup> and
- would recreate "the potential pitfalls of expanding false claims acts to include tax claims" as already experienced by individuals and businesses in Illinois and New York.<sup>43</sup>

Sounds pretty scary. But almost none of it is true.

For starters, A.B. 1270 severely restricted access to the courthouse for whistleblowers and their attorneys, thereby making the possibility of "frivolous shakedown lawsuits" remote. As detailed in the discussion of False Claim #1, the proposed amendments to California's FCA authorized the attorney general and state tax authorities to act as gatekeepers over tax claims proceeding under the FCA, and further vested state tax authorities with effective veto power over tax claims.

Recall that under the proposed FCA amendments, the attorney general would have

<sup>38</sup> Kranz et al., *supra* note 22. See also COST, *supra* note 20 (claiming that "third parties driven by their own financial interests" would, *ipso facto*, become tax administrators); Powell, *supra* note 18 (A.B. 1270 would "introduce plaintiffs' attorneys into tax enforcement," thereby "letting fee-seeking plaintiffs' attorneys enforce tax law"); and Shail Shah et al., "California Tax Takes: A Tool to Fight Underpayment Penalties," Law360 (Aug. 19, 2019) (writing that a "cottage industry has already developed in California for law firms bringing nontax California FCA matters and it is likely the same firms will expand to include tax claims if the bill passes").

<sup>39</sup> CJAC, *supra* note 9.

<sup>40</sup> Shah et al., *supra* note 38.

<sup>41</sup> Kranz et al., *supra* note 22.

<sup>42</sup> *Id.*

<sup>43</sup> Shah et al., *supra* note 38.

<sup>34</sup> Powell, *supra* note 18.

<sup>35</sup> See Kranz et al., *supra* note 22.

<sup>36</sup> Powell, *supra* note 18.

<sup>37</sup> *Id.*

been required to consult with state tax authorities before filing or intervening in actions involving false tax claims.<sup>44</sup> In the event state tax authorities objected to the attorney general filing or intervening in such an action, the attorney general would have been forced to stand down and abandon the claim.<sup>45</sup> Moreover, if the attorney general declined to intervene in an action initiated by a whistleblower (either through the attorney general's own volition after evaluating the merits of the claim with the help of state tax authorities or because tax authorities objected to the attorney general intervening), the whistleblower could only proceed with the action as a *qui tam* plaintiff if the attorney general consented in writing.<sup>46</sup>

The statutory framework of the FCA contemplated by A.B. 1270 was mandatory consultation with state tax authorities for all FCA tax claims, mandatory consent from state tax authorities to proceed to litigation, and mandatory written consent from the attorney general permitting whistleblowers to conduct the action on their own. These provisions virtually guaranteed that only the most meritorious tax claims would end up in court.

Opponents of A.B. 1270 were equally off base when discussing and invoking the experience of states whose FCAs permit tax claims. "In countless cases in Illinois and New York," critics offered, "we have seen companies face False Claims Act shakedowns and be forced to pay nuisance-value settlements."<sup>47</sup> Others critics toed the party line: "Cottage industries have developed in New York and Illinois, where plaintiff-side law firms specialize in finding industries or products where the sales tax collection obligations are ambiguous and then looking for whistleblowers."<sup>48</sup> If A.B. 1270 became law, the party line warned, it "would bring the

horrors experienced in Illinois and New York to taxpayers doing business in California."<sup>49</sup>

The doomsayers' invocation of Illinois and New York as proof that A.B. 1270 would precipitate "frivolous shakedown lawsuits" was false and misleading.

## Illinois

Comparing the statutory changes to California's FCA contemplated by A.B. 1270 with the current Illinois FCA is like comparing apples with orangutans.

For its part, A.B. 1270 applied to false tax claims only if the taxpayer's income or sales exceeded \$500,000 and damages to the state or locality exceeded \$200,000.<sup>50</sup> In other words, the income and damages threshold imposed by A.B. 1270 prevented small-dollar claims against small-time taxpayers, and instead focused the statute on high-dollar tax fraud. In contrast, the Illinois FCA — which bars claims as to income taxes but not sales and use taxes<sup>51</sup> — contains no such filtering mechanism to exclude low-dollar nuisance suits. Thus, a whistleblower in Illinois could bring a tax claim under the state's FCA alleging \$1 of harm perpetrated by a taxpayer with \$1 in income or sales.

No wonder Illinois has experienced what can only be described as an onslaught of nuisance suits pertaining to tax fraud under its FCA. In fact, a single law firm — headed by the media-dubbed "king of *qui tam*," Stephen Diamond — has filed more than 1,000 FCA cases against remote sellers alleging fraud for failure to collect sales and use taxes.<sup>52</sup> In those cases, the law firm filed suit after conducting investigations based almost exclusively on information already in the public domain or after ordering a few items online from an out-of-state retailer and then bringing an

<sup>44</sup> See Cal. Gov't Code section 12651(f)(3).

<sup>45</sup> *Id.*

<sup>46</sup> *Id.*

<sup>47</sup> Kranz et al., *supra* note 22.

<sup>48</sup> Shah et al., *supra* note 38.

<sup>49</sup> Kranz et al., *supra* note 22. See also Shah et al., *supra* note 38 and accompanying text; and California Chamber of Commerce and Civil Justice Association of California, "AB 1270 (Stone) False Claims Act, Oppose — As Amended August 13, 2019 to Members," Senate Appropriations Committee (Aug. 16, 2019) (stating that "Illinois' similar law provides an example of the potential abuse").

<sup>50</sup> See Cal. Gov't Code section 12651(f)(1).

<sup>51</sup> See 740 Ill. Comp. Stat. 175/3(c). See also 740 Ill. Comp. Stat. 175/3(a).

<sup>52</sup> See e.g., Michael Bologna, "Prolific Whistleblower Won't Get Share of Tailors' Unpaid Tax," *Bloomberg Tax*, Feb. 28, 2019; and Bologna, "Settlement Data Reveals Lawyer's False Claims Freight Train," *Bloomberg Law*, Oct. 19, 2016.

action when the vendor failed to charge Illinois sales tax on the transaction.

Over the last 15 years, these cases have netted \$30 million in proceeds, penalties, and attorney's fees with the law firm receiving \$11.6 million of the take. Had the Illinois FCA contained thresholds for income or sales of the taxpayer and damages pled — like the \$500,000/\$200,000 thresholds in A.B. 1270 — almost none of these cases would have seen the light of day.

## New York

A.B. 1270 opponents assailed New York's FCA, which the State Legislature amended in 2009 to authorize "claims, records, or statements made under the tax law."<sup>53</sup> Critics of A.B. 1270 pointed to "countless cases" in which New York companies faced "shakedowns" and paid "nuisance-value settlements."<sup>54</sup> The same injustices would befall California businesses under A.B. 1270, they warned, with companies defending "high-stakes civil investigations and/or litigation — even when the Attorney General's Office declines to intervene."<sup>55</sup>

Critics pointed to a high-profile case brought under New York's FCA as evidence of the dangers a New York-style FCA would bring to California. The case at hand resulted in telecommunications giant Sprint settling with the state for \$330 million for knowingly failing to collect and remit state and local taxes owed on its flat-rate wireless calling plans. According to opponents of A.B. 1270, the case revealed "the potential pitfalls of expanding false claims acts to include tax claims."<sup>56</sup>

Given that the sponsors of A.B. 1270 looked to and relied upon New York's FCA in drafting statutory language to include tax claims under California's FCA, the criticism of New York's purported experience with tax claims played a key role in derailing A.B. 1270.

Critics' characterization of New York's FCA, however, was false and misleading. It was false

because "countless cases" did not follow New York's decision to add tax claims to the statute. According to a recent empirical study, there have been a grand total of 17 settlements pertaining to tax disputes since the Legislature added tax claims to New York's FCA 10 years ago, 11 of which were originated by *qui tam* plaintiffs<sup>57</sup> — a far cry from "countless"<sup>58</sup> cases opening up the "litigation floodgates"<sup>59</sup> as A.B. 1270 naysayers predicted.

Further, there have been no reports of New York *qui tam* plaintiffs prosecuting tax claims to successful completion (that is, receiving a settlement or judgment) after the attorney general declined to prosecute.<sup>60</sup> Moreover, New York courts have dismissed five declined cases involving a *qui tam* plaintiff.<sup>61</sup> Even the king of *qui tam* has been stonewalled by New York's FCA. Over the last 10 years, while Diamond filed hundreds of cases in Illinois involving vendors' failure to collect and remit Illinois sales taxes, he filed just one such tax case in New York. And that case resulted in the attorney general intervening, prosecuting, and securing a settlement of more than \$1 million.<sup>62</sup>

Much of New York's success in preventing whistleblowers like Diamond from abusing its false claims statute can be attributable to two structural aspects of the FCA: (i) high thresholds for damages pleaded in the action and income or sales of the taxpayer subject to the action, and (ii) the collaborative gatekeeper role of the State Department of Taxation and Finance and the attorney general's office in filtering out unmeritorious claims.

Regarding high thresholds, New York's FCA only permits tax claims with damages pleaded

<sup>53</sup> N.Y. State Fin. Law section 189(4)(a). For the full statute, see N.Y. State Fin. Law sections 187-94.

<sup>54</sup> Kranz et al., *supra* note 22.

<sup>55</sup> *Id.* See also *supra* notes 35-43 and accompanying text.

<sup>56</sup> Shah et al., *supra* note 38.

<sup>57</sup> Gregory Krakower, "New York False Claims Act Tax *Qui Tams*: Evidence and Evaluation," manuscript on file with author. The 17 settlements resulted in \$459 million in recoveries, with the 11 *qui tam* settlements reflecting nearly 95 percent of total recoveries (or \$432.1 million).

<sup>58</sup> Kranz et al., *supra* note 22.

<sup>59</sup> *Id.*

<sup>60</sup> Two reported *qui tam* cases involving taxes have survived motions to dismiss and are being litigated. Krakower, *supra* note 57. See *Anonymous v. Anonymous*, 83 N.Y.S.3d 472 (1st Dept. 2018); *State of N.Y. ex rel. Campagna v. Post Integrations Inc.*, aff'd 81 N.Y.S.3d 14 (1st Dept. 2018).

<sup>61</sup> Krakower, *supra* note 57.

<sup>62</sup> See New York attorney general release on whistleblower settlement (Aug. 17, 2016).



exceeding \$350,000 and taxpayers whose net income exceeds \$1 million.<sup>63</sup> These thresholds automatically exclude low-dollar claims while focusing on high-dollar tax fraud perpetrated by high-income individuals and businesses. By contrast, the Illinois FCA contains no thresholds for damages pleaded or taxpayer's income and sales, a structural deficiency that allowed Diamond to establish a business model for his law firm focused almost exclusively on low-dollar claims.

As to the gatekeeper role of state tax authorities and the attorney general, New York's FCA obligates the attorney general to consult with the tax department before filing or intervening in an action pertaining to the state's tax laws.<sup>64</sup> That consultation injects tax expertise into the administrative and enforcement process and filters out unmeritorious claims while flagging meritorious ones.

It is worth pointing out that the amendments to A.B. 1270 contained even stronger gatekeeper provisions than New York's FCA. Specifically, the amendments to California's FCA would have required the attorney general to not only consult with the relevant tax authorities, but also receive consent before filing or intervening in any action.<sup>65</sup> Also, if the attorney general declined to prosecute the action, the whistleblower in the matter could only proceed on her own if the attorney general consented in writing.<sup>66</sup>

Finally, opponents of A.B. 1270 mischaracterized the *Sprint* case in the same false and misleading way that they equated the Illinois FCA with California's FCA as amended by A.B. 1270. Far from reflecting "the potential pitfalls of expanding false claims acts to include tax claims,"<sup>67</sup> *Sprint* illustrates the benefits of reinforcing traditional tax enforcement with whistleblowers whose unique information can

assist tax authorities in uncovering and prosecuting undetected tax fraud.

The *Sprint* case began in 2011 when a whistleblower filed suit against Sprint under New York's recently amended FCA. Together, the New York attorney general and tax department conducted a yearlong investigation into the whistleblower's allegations — ultimately converting the case into a civil enforcement action in 2012. Later, three New York courts rejected Sprint's efforts to dismiss the lawsuit,<sup>68</sup> and the U.S. Supreme Court declined to hear Sprint's appeal.<sup>69</sup> In December 2018 Sprint settled with New York for \$330 million for knowingly failing to collect and remit state and local taxes owed on its flat-rate wireless calling plans.

In the words of New York's attorney general:

Sprint knew exactly how New York sales tax law applied to its plans — yet for years the company flagrantly broke the law, cheating the state and its localities out of tax dollars that should have been invested in our communities.<sup>70</sup>

Internal documents uncovered by the state during its investigation indicated that Sprint:

- knew it owed tax on the calling plans (knowledge also privy to its in-house tax lawyers);
- had previously paid the proper amount of sales tax owed on the plans;
- reversed course at some point and stopped paying the proper amount;
- ignored formal guidance issued by the tax department clearly indicating that Sprint's practices were illegal; and
- further ignored a ruling from New York's highest court holding that the tax statute Sprint knowingly violated was unambiguous.

Thus, far from embodying the fallacies of permitting tax claims under state FCAs, the *Sprint* case — and more broadly, New York's successful

<sup>63</sup> See N.Y. State Fin. Law section 189(4)(a)(i)-(ii).

<sup>64</sup> See *id.* at section 189(4)(b). Also, in the event the attorney general declines to participate in an action, the *qui tam* plaintiff must obtain approval from the attorney general before motioning a court to compel the tax department to disclose the accused taxpayer's tax records. *Id.*

<sup>65</sup> See Cal. Gov't Code section 12651(f)(8).

<sup>66</sup> *Id.*

<sup>67</sup> Shah et al., *supra* note 38.

<sup>68</sup> See *People v. Sprint Nextel*, 26 N.Y.3d 98 (Ct. of App. of N.Y. 2015); *People v. Sprint Nextel*, 980 N.Y.S.2d 769 (N.Y. App. Div. 2014); and *People ex. rel. Schneiderman v. Sprint Nextel*, 970 N.Y.S.2d 164 (N.Y. Sup. Ct. 2012).

<sup>69</sup> *Sprint Nextel Corp. v. New York*, 136 S. Ct. 2387 (2016), *cert. denied*.

<sup>70</sup> New York attorney general release on *Sprint* settlement (Dec. 21, 2018).

tax enforcement actions over the last 10 years initiated by whistleblowers<sup>71</sup> — is a story of the statute working as planned; that is, with citizen whistleblowers complementing traditional tax enforcement methods by rooting out otherwise undetected tax fraud and exposing tax cheats.

## Opponents' Motives and Hypocrisy

### Concealing Tax Fraud

Thus, A.B. 1270 would not have:

- applied to good-faith disputes over California tax laws;
- usurped the administrative and enforcement functions of state tax authorities;
- duplicated the existing penalty regime; or
- brought an onslaught of nuisance suits.

So why were its opponents so scared about its passage?

The answer may lie in one of the few truthful statements opponents uttered. Specifically, critic after critic railed against the possibility that taxpayers could face liability for tax fraud in a post-A.B. 1270 world even after the taxpayer received a clean audit from tax authorities, entered into settlement agreements, participated in voluntary disclosure programs, or otherwise seemingly closed an issue.<sup>72</sup> Indeed, opponents portrayed A.B. 1270 “as a hunting license that would force unsuspecting taxpayers to defend themselves even when tax authorities have cleared them of fraud accusations.”<sup>73</sup> This

treatment amounted to “double jeopardy”<sup>74</sup> (with taxpayers facing liability for tax positions that authorities had blessed) and even “triple jeopardy” (defending accusations “from the agency, the attorney general, and private parties”).<sup>75</sup>

Putting aside for a moment the provocative though factually inapt use of the terms “double jeopardy” and “triple jeopardy,” opponents of A.B. 1270 were right to fear a tax enforcement regime in which taxpayers can be held liable for fraudulent tax positions after disclosing or resolving those positions with tax authorities. In fact, we already live in that world — and opponents of A.B. 1270 are well aware of that reality.

Consider “closing agreements” with the IRS. These agreements between the IRS and a taxpayer — binding on both parties but not subject to the law of contracts — assist the taxpayer in correcting a prior-year error, mistake, or misinterpretation of the tax law or a filing requirement. They are designed to provide finality as to a dispute or controversy between the taxpayer and the IRS, with one exception:

Closing agreements are final and issues resolved in a closing agreement will not be reopened, annulled, modified, set aside, or disregarded by the federal government or the courts for tax years covered by a closing agreement (*except in cases of fraud, malfeasance or misrepresentation of material fact on the part of the taxpayer*).<sup>76</sup>

That’s right, closing agreements can be reopened if the taxpayer entered into the agreement fraudulently, with malfeasance, or by misrepresenting any material fact associated with tax positions covered by the agreement. This makes sense:

- the tax authority entered into an agreement based on a set of facts provided by the taxpayer;

<sup>71</sup>For a sampling of New York’s successful tax enforcement actions initiated by citizen-whistleblowers, see the list of Taxpayer Protection Bureau releases on the New York attorney general website.

<sup>72</sup>See e.g., Kranz et al., *supra* note 22 (writing that A.B. 1270 applied to tax positions “even when the position was resolved through the California Department of Tax and Fee Administration, the State Board of Equalization, the Franchise Tax Board or a local government. Settlement agreements, voluntary disclosure agreements and audit closing agreements all would be disrupted if the AG or a plaintiffs’ lawyer believes the underlying tax dispute or uncertainty is worth pursuing under the CFCA”); Moutrie, *supra* note 29 (“AB 1270 fails to include any protection for a taxpayer who has already handled a transaction with the taxing agencies. For example, if a taxpayer is audited and no issues are found, the taxpayer still could face an FCA lawsuit years later if AB 1270 becomes law.”); Powell, *supra* note 18 (lamenting that “plaintiffs’ attorneys can still sue when a taxpayer has had a clean audit or settled an issue with a taxing agency”).

<sup>73</sup>Walters, *supra* note 21.

<sup>74</sup>See, e.g., Moutrie, *supra* note 29 (“This double jeopardy issue makes concerns about profit-driven plaintiff’s attorneys all the more apparent — regardless of whether the taxing agencies have signed off on a taxpayer’s documents, that taxpayer is still at risk of a lawsuit.”).

<sup>75</sup>Coffill, *supra* note 9.

<sup>76</sup>IRS, ITG Voluntary Closing Agreement Process (emphasis added).

- the actual facts were different and known to the taxpayer but not to the tax authority;
- the tax authority may or may not have entered into the same agreement had it been privy to the actual facts; and therefore
- the tax authority has the right to invalidate or otherwise alter the agreement.

Further, and most relevant to our discussion here, information provided by whistleblowers offers the most likely (and perhaps only) source for tax authorities to learn of the actual facts and uncover the fraud after signing a closing agreement. In this sense, whistleblowers are not as far outside the framework of traditional tax administration and enforcement as opponents of A.B. 1270 would have us believe.

For good reason, A.B. 1270 naysayers fear whistleblowers exposing false facts and undetected fraud. Information that whistleblowers provide tax authorities can set aside closing agreements, reopen audits, modify settlement agreements, and annul voluntary disclosure agreements. More than any other source, information possessed by whistleblowers can subject taxpayers to liability long after they have escaped liability for their undetected fraud.

A recent case underscores this possibility for critics of A.B. 1270. The taxpayer at issue had signed closing agreements to settle tax liabilities with both the state and city of New York. The agreements were “final, conclusive and irrevocable for the liabilities of the Taxpayer for the subject taxes, penalties, interest and Audit Period.”<sup>77</sup> By their terms, however, the agreements did not release the taxpayer from actions amounting to “fraud, malfeasance or misrepresentation of material fact.”<sup>78</sup>

A whistleblower brought an action under New York’s FCA alleging that the taxpayer knowingly submitted false and fraudulent tax returns pertaining to a captive insurance tax shelter. The taxpayer argued that the closing agreements with New York tax authorities barred the whistleblower’s claims for the years covered by the agreements. But the court ruled that to the

extent the taxpayer’s liability under the FCA was predicated upon a showing of “fraud, malfeasance or misrepresentation of material fact,” the whistleblower’s claims were not barred because the closing agreements did not release the taxpayer from those actions.<sup>79</sup>

While A.B. 1270 opponents might decry the outcome in this case as an example of the taxpayer facing double jeopardy, that characterization would be false. Closing agreements with tax authorities expressly permit them to revisit agreements in the event new facts emerge indicating a taxpayer entered into the agreement fraudulently. Similarly, the double jeopardy defense requires that a defendant who was previously acquitted or convicted show that she is about to be tried for a second time on the same or similar charges and typically involving the same set of facts. In both instances, if the facts are different, all bets are off. Thus, to the extent whistleblowers provide tax authorities with new facts about a taxpayer, the finality of closing agreements can be invalidated and the double jeopardy defense falls apart.

The claim that taxpayers would have been subject to triple jeopardy under A.B. 1270 (with taxpayers defending accusations “from the agency, the attorney general, and private parties”) is even more preposterous.

Recall that A.B. 1270 required the attorney general to consult with and receive consent from the relevant tax authorities before proceeding with a tax claim brought by a whistleblower. To the extent authorities consented to the attorney general converting the claim into a civil enforcement action, the attorney general would assume responsibility for conducting the action (presumably in coordination with tax authorities).<sup>80</sup> Alternatively, if the attorney general declined to proceed with the action and the claim involved funds of a political subdivision,<sup>81</sup> the prosecuting authority<sup>82</sup> of the

<sup>79</sup> *Id.* at 480.

<sup>80</sup> See Cal. Gov’t Code section 12652(a)-(c).

<sup>81</sup> See *id.* at section 12650(b)(6) (defining political subdivision as “any city, city and county, county, tax or assessment district, or other legally authorized local governmental entity with jurisdictional boundaries”).

<sup>82</sup> See *id.* at section 12650(b)(8) (defining prosecuting authority as the “county counsel, city attorney, or other local government official charged with investigating, filing, and conducting civil legal proceedings on behalf of, or in the name of, a particular political subdivision”).

<sup>77</sup> *Anonymous v. Anonymous*, 83 N.Y.S.3d 472, 476 (Sup. Ct. of N.Y. 1st Dept. 2018).

<sup>78</sup> *Id.*

political subdivision could intervene and assume responsibility for conducting the action.

All of those procedural permutations mean that a whistleblower can become a *qui tam* plaintiff conducting the action only if the attorney general declines to prosecute the action, the prosecuting authority declines to intervene (when political subdivision funds are at issue), and the attorney general consents in writing to the whistleblower prosecuting the action.<sup>83</sup> Under A.B. 1270, a taxpayer would never have been forced to defend accusations from three sources at the same time. Instead, potential opponents would only include:

- the attorney general working alongside tax authorities in a single action;
- a prosecuting authority; or
- the whistleblower turned *qui tam* plaintiff.

At the end of the day, and after wading through the posturing and hyperbole of business interests opposed to A.B. 1270, it is hard not to conclude that private sector opposition embraces a view of tax enforcement that goes something like this:

If traditional methods of enforcement fail to catch taxpayers' false facts and undetected fraud, those taxpayers should be in the clear, free from ever having to worry about being held liable for their fraud and misrepresentation.

Whistleblowers and false claims statutes complicate that worldview, so much so that the forces working to conceal false facts and fraud are right to be afraid.

### Faux Deference to Deference

While fighting to prevent tax fraud from being exposed by whistleblowers, critics of A.B. 1270 went out of their way to praise California tax authorities.

The state's administration of its tax laws, according to the California Chamber of Commerce and the Civil Justice Association of California in an opposition letter signed by a

slew of business organizations, is "handled by taxing agencies with expertise in taxes, well-developed procedures, and no profit-motive."<sup>84</sup> The chamber also lauded the current dispute resolution regime for producing "efficient, consistent resolution of tax disputes."<sup>85</sup> For its part, the Council On State Taxation said California tax authorities "employ experts capable of dealing with complex tax issues, many of which are nuanced and often subject to degrees of interpretation."<sup>86</sup> Reading from the same script, corporate law firms that defend the business opposition to A.B. 1270 noted that California's "many and complex" tax laws are "already administered" by "multiple specialized agencies . . . fully capable of dealing with tax fraud."<sup>87</sup>

The overriding message from critics of A.B. 1270 was that in contrast to "the efficiency of tax agencies' review and appeal process,"<sup>88</sup> permitting tax claims initiated by whistleblowers under California's FCA would be a disaster. Indeed, while condemning private enforcement of tax laws, critics exalted public enforcement.

Or so it seemed. The truth is that many of the same voices praising California's "expert," "specialized," "efficient," "consistent," "fully capable," and "well-funded" tax authorities have been hard at work gutting not just private enforcement of tax laws but also public enforcement.

Specifically, two legal powerhouses have formed coalitions to eliminate judicial deference to agency rules with a special focus on tax rules, particularly state tax rules.<sup>89</sup> McDermott Will & Emery has launched the Deference Coalition,<sup>90</sup>

<sup>84</sup> California Chamber of Commerce and Civil Justice Association of California et al., *supra* note 49.

<sup>85</sup> California Chamber of Commerce, *supra* note 8.

<sup>86</sup> COST, *supra* note 20.

<sup>87</sup> Coffill, *supra* note 9 (Coffill is senior counsel at Eversheds Sutherland). See also Kranz, *supra* note 22 (lamenting that A.B. 1270 would "undermine the authority of California tax administrators"). Kranz is partner at McDermott Will & Emery.

<sup>88</sup> California Chamber of Commerce, *supra* note 49.

<sup>89</sup> Paige Jones, "Law Firms Launch Coalitions to Tackle Judicial Deference," *State Tax Notes*, May 27, 2019, p. 790.

<sup>90</sup> See, e.g., McDermott Will & Emery, "An Uneven Playing Field: Judicial Deference to State Tax Administrator Interpretations" (May 13, 2019).

<sup>83</sup> See *id.* at section 12652(c)(6)(B). Again, the one caveat to this process is if, after the attorney general has declined to conduct the action, a prosecuting authority of a political subdivision intervenes and converts the claim into a civil enforcement action.



while Eversheds Sutherland formed the Reform Administrative Deference (RAD) Coalition.<sup>91</sup> Neither firm has revealed the membership rolls of its coalitions except to say they include businesses and trade associations.<sup>92</sup> Both firms claim (without providing any empirical data) that judicial deference to state tax authorities' statutory interpretation "has played a determinative role in state tax litigation"<sup>93</sup> and "put[s] taxpayers at a disadvantage in both judicial and nonjudicial tax disputes."<sup>94</sup>

There are important differences between each firm's anti-deference efforts. McDermott's Deference Coalition focuses on limiting the deference courts give to "subregulatory" guidance promulgated without following a state's Administrative Procedure Act.<sup>95</sup> Eversheds Sutherland's RAD Coalition represents a considerably more radical campaign that seeks to "eliminate deference across the country,"<sup>96</sup> including all forms of guidance — even full-blown regulations. As part of its effort, Eversheds Sutherland attacks a long-standing judicial justification for agency deference, namely an agency's specialized subject matter expertise,<sup>97</sup> by arguing that such expertise — if it exists at all — is unnecessary for adjudicating tax disputes at the state level because "many states have specialized tax tribunals."<sup>98</sup>

Moreover, according to Eversheds Sutherland, state tax agencies are less interested in leveraging tax expertise when evaluating tax

positions than in fulfilling their "mission . . . to collect revenue."<sup>99</sup> In other words, state tax authorities are neither expert nor impartial, and their legal interpretations deserve no deference.

Critics of these anti-deference campaigns counter that the efforts are ideologically motivated and wrong on the facts. According to Darien Shanske, the campaigns amount to "an ideological attempt to reduce the power of governments to function,"<sup>100</sup> while Peter D. Enrich has called the efforts "part of a broad attack on the basic notion that government needs to be conducted through administrative agencies that need to fill in a level of detail and bring a level of expertise" that legislatures and courts cannot be expected to bring.<sup>101</sup> Critics also challenge the law firms' claims that judicial deference to state tax authorities prevents judges from independently interpreting the law,<sup>102</sup> and that state tax authorities are more worried about maximizing revenue than effectuating legislative intent under the tax laws.<sup>103</sup>

I highlight this debate over the proper amount of judicial deference to state tax authorities because the law firms behind the anti-deference coalitions were also vocal critics of A.B. 1270. Indeed, McDermott and Eversheds Sutherland peddled all the criticisms of A.B. 1270 that this article set out to disprove.<sup>104</sup> Moreover, in arguing against A.B. 1270 and private enforcement of the tax laws, both law firms argued in favor of keeping California's tax authorities — "specialized agencies . . . fully

<sup>91</sup> See, e.g., Eversheds Sutherland, "Our Ideas Are Taking Off: Finding Success in Efforts to Eliminate Administrative Deference in State Tax Matters."

<sup>92</sup> Jones, *supra* note 89, at 790.

<sup>93</sup> Maria M. Todorova, Eric S. Tresh, and Justin T. Brown, "It's Time to Balance the Scales: Chevron Deference," *Tax Notes State*, July 8, 2019, p. 103.

<sup>94</sup> *Id.* See also Eversheds Sutherland, "Eversheds Sutherland's Coalition to Reform Administrative Deference (RAD) Updates Georgia Legislative Efforts and Announces Expansion to Additional States" (claiming that judicial deference to state tax authorities "prevents courts from exercising independent judgment and violates fundamental principles of separation of powers and due process").

<sup>95</sup> Jones, *supra* note 89, at 791 (summarizing remarks by Kranz that McDermott's coalition is focused on "subregulatory guidance such as regulations, tax bulletins, and notices issued by revenue departments that don't follow an APA on tax disputes").

<sup>96</sup> *Id.*

<sup>97</sup> See *Chevron U.S.A. Inc. v. Natural Resources Defense Council Inc.*, 467 U.S. 837, 865-66 (1984).

<sup>98</sup> Todorova et al., *supra* note 93.

<sup>99</sup> *Id.* at 108. See also *id.* at 103 (stating that judicial deference "encourages state tax administrators' propensity to maximize tax revenue associated with ambiguous tax statutes"); *id.* at 108 (claiming that a state tax authority's interpretation of law is "clouded by its search for new tax revenue" and the "prevention of refunds from the treasury").

<sup>100</sup> Bucks, Peter D. Enrich, Michael Mazerov, and Darien Shanske, interviewed by Doug Sheppard, "The Anti-Deference Fallacy," *Tax Notes State*, Sept. 2, 2019, p. 913.

<sup>101</sup> *Id.*

<sup>102</sup> *Id.* at 914, 919 (quoting Bucks, "the notion that deference is a bar that is keeping judges from making their own interpretation of the law is . . . just not correct or true in actual practice," and "judges are not at all restrained by some supposed magic deference wand wielded by tax agencies").

<sup>103</sup> *Id.* at 915 (quoting Enrich, such a view of state tax authorities "isn't a reasonable description of what they do," and "it simply isn't a fair description of state agencies that they're acting primarily out of a revenue-maximization motivation").

<sup>104</sup> See Coffill, *supra* note 9, also available on the Eversheds Sutherland website. See also Todorova et al., *supra* note 93. See Kranz et al., *supra* note 22.

capable of dealing with tax fraud”<sup>105</sup> — as the sole guardians of administering and enforcing those laws.

In other words, while the law firms worked to gut public enforcement of state tax laws through their anti-deference coalitions, they also condemned private enforcement of state tax laws by praising the same public agencies they have been hellbent on weakening. Three observations flow from the law firms’ hypocrisy:

- First, while it is not inconsistent to dislike and condemn both private and public enforcement of tax laws, it is certainly obnoxious.
- Second, it is inconsistent and disingenuous to, on the one hand, praise public enforcement of tax laws while condemning private enforcement of those laws and, on the other hand, mount a withering campaign against public enforcement.
- Third, and ironically, the law firms’ anti-deference campaign (which has the direct result of weakening public enforcement of tax laws) makes the case for private enforcement that much stronger. Stated differently, the argument for permitting tax claims under a state’s FCA becomes more persuasive — perhaps even necessary — if the regulators are not empowered to perform their jobs.

### Conclusion

It is unclear whether the sponsors of A.B. 1270 plan to initiate another legislative effort in 2020 to add tax claims to California’s FCA. If they do, we can expect critics of A.B. 1270 to redouble their opposition and to spread more misinformation about the effects of permitting private citizens to help tax authorities combat tax fraud through whistleblowing. Those of us who support

supplementing public enforcement of tax laws with private enforcement of those laws need to be prepared to refute critics’ false information and to highlight the benefits of tax whistleblowing.

We should also be ready to offer policy alternatives to amending California’s FCA to include tax claims. The most viable alternative to the litigation model reflected in false claims statutes would involve embracing an administrative solution such as a stand-alone whistleblower statute similar to the IRS whistleblower program.<sup>106</sup> Indeed, some opponents of A.B. 1270 lauded the IRS program as a counterpoint to A.B. 1270, and suggested that if the California State Legislature wanted to promote and reward private enforcement of the tax laws, “the goal of motivating whistleblowers and addressing tax fraud can be accomplished by simply adopting (and funding) a tax whistleblower program similar to the very successful programs offered by the IRS and many other states.”<sup>107</sup>

We will have to see if these voices are as sanguine about getting behind a tax whistleblower statute if and when California lawmakers tackle the issue again. ■

<sup>105</sup> Coffill, *supra* note 9. See also Kranz et al., *supra* note 22 (arguing to preserve “the authority of California tax administrators” in administering and enforcing the state’s tax laws).

<sup>106</sup> The IRS program, reflected in 26 U.S.C. section 7623, is widely regarded as a success, particularly after Congress amended the statute in 2006. See Tax Relief and Health Care Act of 2006, P.L. 109-432 section 406, 120 Stat. 2922, 2958-60. For the last 10 years, the enhanced IRS whistleblower program recovered nearly \$4.5 billion in tax revenue and paid out more than \$770 million in awards to whistleblowers. See IRS, “Whistleblower Program Fiscal Year 2018 Annual Report to Congress,” 9 (2019); IRS, “IRS Whistleblower Program Fiscal Year 2015 Annual Report to the Congress,” 11 (2015); and IRS, “U.S. Department of Treasury, Fiscal Year 2012 Report to Congress on the Use of Section 7623,” 17 (2013). See also Whistleblower-Informant Award. For additional commentary of the IRS whistleblower program, see Ventry, “Stitches for Snitches: Lawyers as Whistleblowers,” 50 *U.C. Davis L. Rev.* 1455, 1477-85 (2017); Ventry, “Not Just Whistling Dixie: The Case for Tax Whistleblowers in the States,” 59 *Vill. L. Rev.* 425, 490-97 (2014); and Ventry, “Whistleblowers and *Qui Tam* for Tax,” 61 *Tax Law.* 357, 357-68, 370-82 (2008).

<sup>107</sup> See Kranz et al., *supra* note 22.